Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

In re John H. Bisbee,

Petitioner.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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81 pp

QUESTIONS PRESENTED

1. May a state court, consistently with the Privileges and Immunities Clause of Article IV, § 2 and the Sixth Amendment right to counsel, force a non-resident criminal defendant to trial on two felonies without any counsel pursuant to a state law authorizing denial to defendant the *pro hac vice* representation of his home state counsel of choice without first hiring full time at full fee a forum state lawyer as lead counsel which defendant neither desires nor is financially able to do and notwithstanding defendant's having engaged local counsel to protect the forum state's interests as described in *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274, 285-287 (1980) and *Wheat v. United States,* 486 U.S. 153, 159-164 (1988)?

2. Does the Seventh Circuit's judgment sanctioning as "frivolous" Petitioner's argument that a non-resident criminal defendant had the Article IV, § 2 privilege and immunity and Sixth Amendment right to counsel to avoid trial on two felonies without any counsel by reason of the forum state court's order denying, pursuant to state law, defendant the *pro hac vice* representation of his home state counsel of choice without first hiring full time at full fee a forum state lawyer as lead counsel, notwithstanding defendant's having engaged local counsel to protect the forum state's interests as described in *Supreme Court of New Hampshire v. Piper, supra* and *Wheat v. United States, supra,* violate the mandate of this Court to the Seventh Circuit in *McKnight v. General Motors,* 511 U.S. 659 (1994), as Petitioner's argument was specifically reserved for

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decision in *Leis v. Flynt*, 439 U.S. 438, 442 n.4 (1979), and has not yet been decided?

3. Does the Rule 38 F.R.A.P. sanction judgment below conflict with this Court's Sixth Amendment precedents by punishing a lawyer for discharging his Sixth Amendment duty to render the effective assistance of counsel to a non-resident criminal defendant by pursuing the only avenues available, federal removal and § 1983 injunctive relief, to prevent his client from being forced to trial on two felonies with no counsel at all, notwithstanding the likelihood that forum state appellate review would reverse any resulting conviction and order a new trial?

4. May a court of appeals *sua sponte* impose sanctions for a "frivolous" appeal under Rule 38 F.R.A.P. notwithstanding the rule's textual requirement that sanctions may be imposed only "after a separately filed motion or notice from the court and reasonable opportunity to respond", particularly when the sanction judgment of the court below is in direct conflict with the its own judgments and those of all the other circuits construing Rule 38 F.R.A.P. in conformity with the rule's textual requirements and the requirements of due process?

PARTIES IN THE COURT BELOW

The parties in the consolidated appeals below were, in No. 97-2047, the State of Indiana as the Plaintiff-Appellee v. Richard Haws as the Defendant-Appellant, and in 97-2521, Richard Haws as the Plaintiff-Appellant v. Individual Justices of the Indiana Supreme Court, Jeffery Modisett, and Vincent F. Grogg, All in Their Official and/or Administrative Capacities, as the Defendant-Appellees (Haws and State or Indiana). Petitioner was counsel of record for Haws in both appeals.

On October 27, 1997, Petitioner received letters from Haws and Indiana Attorney James McCabe discharging Petitioner and directing him to dismiss the appeals below, respectively. On October 28, Petitioner so moved. On October 30, Indiana responded and agreed to dismissal of the appeals, but stated, as it had at the conclusion of its main brief, that it,

> "continue[d] to believe that these appeals [were] patently frivolous and should never have been filed . . . and that [dismissal of the appeals] d[id] not prevent the court from considering . . . sanctions *sua sponte* under Circuit Rule 38."

On November 4, Petitioner moved for leave to reply by asking that if the court retained jurisdiction, it do so to reach the merits. The court below ordered oral argument to proceed on November 6, 1997, resulting in the

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judgment hereafter described and which Petitioner is, by this petition, asking this Court to review.[1]

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[1] Petitioner filed a verified post argument motion seeking leave to respond to false statements, not of record and never before advanced, made by Indiana at oral argument in support of sanctions. That motion attached correspondence among Attorney McCabe, Haws' Illinois business attorney, Petitioner's local counsel in the federal actions on appeal, and Petitioner, which contemporaneously recorded that Haws was induced by McCabe to discharge Petitioner on McCabe's erroneous advice that the appeals below were for the purpose of securing Petitioner's right to practice law in Indiana. McCabe also advised, correctly or incorrectly, that Petitioner had angered the Indiana trial court judge by naming him as a party defendant in Haws' § 1983 action. The court below did not rule on Petitioner's motion.

RULE 29.1 STATEMENT

There are no corporations involved and, therefore, no subsidiary corporations.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, John H. Bisbee (Petitioner), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit dismissing and finding "frivolous" and sanctionable the consolidated appeals below by reaching the merits in both, holding in 97-2047 that *State of Georgia v. Rachel*, 384 U.S. 780 (1966), restrictions on removal,[2] and in 97-2521, that *Younger v. Harris*, 401 U.S. 37 (1971), abstention required Petitioner to abandon his client, appellant below, to face trial on two felonies without any counsel by reason of an Indiana Circuit Court order, facially authorized by Indiana law, denying appellant the *pro hac vice* representation of Petitioner without first hiring full time at full fee as lead counsel an Indiana lawyer, notwithstanding Petitioner's having engaged local Indiana counsel to satisfy the concerns described in *inter alia*, *Supreme Court of New Hampshire v. Piper*, *supra* and *Wheat v. United States*, *supra*.

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[2] The court below also upheld the district court's holding that Petitioner's Notice of Removal had been untimely as in excess of 30 days from the putative November 25, 1996 arraignment of Haws, notwithstanding that Haws was unrepresented at that arraignment, a critical stage of the prosecution, *United States v. Wade*, 388 U.S. 218, 227 (1967), and notwithstanding that Petitioner attempted to keep the prosecution in the Indiana state court by seeking relief from the Indiana Supreme Court in the nature of mandamus and/or prohibition.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) 1-11a, is reported at 131 F.3d 1205 (7th Cir. 1997). The opinions of the district court removal action, IP97-0061-C-T/G (Dillin, J.), and the 42 U.S.C. § 1983 action, no. IP97-0461-C-D/F (Dillin, J.), (Apps. B and C, *infra*) 12-18a, are not reported.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*) 19a, was entered December 10, 1997. The Seventh Circuit denied a timely petition for rehearing with suggestion for rehearing *en banc* on January 26, 1998 (App. G, *infra*) 21-22a. This petition for certiorari is being brought within 90 days of the court of appeals' denial of petitioner's petition for rehearing with suggestion for rehearing *en banc*. Petitioner invokes this Court's jurisdiction under and pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

A. The United States Constitution, Article IV, § 2, Clause 1 provides that,

> "The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states."

B. The United States Constitution, Amendment VI provides in relevant part that, "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."

C. The United States Constitution, Amendment XIV provides in relevant part:

"No state shall . . . deprive any person of life, liberty or property without due process of law. . . . "

D. Rule 3 of the Indiana "Admission and Discipline Rules" (Rule 3) provides:

"A member of the bar of another state or territory of the United States, or District of Columbia, may appear, in the trial court's sole discretion in Indiana trial courts in any particular proceeding for temporary periods so long as said attorney appears with local Indiana counsel after petitioning the trial court for the courtesy and disclosing in said petition all pending causes in Indiana in which said attorney has been permitted to appear. Local counsel shall sign all briefs, papers and pleadings in such cause and shall be jointly responsible therefor."

E. 28 U.S.C. § 1443 provides in relevant part as follows:

"Any of the following . . . criminal prosecutions commenced in a state court may be removed by the defendant to the District Court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such state a right under any law providing for the equal rights of citizens of the United States, or of all persons within the jurisdiction thereof."

F. 28 U.S.C. § 1446(c)(1) provides:

"A notice of removal of a criminal prosecution shall be filed not later than 30 days after the arraignment in the state court, or at any time before trial, whichever is earlier, except that for good cause shown, the United States District Court may enter an order

granting the defendant . . . leave to file the notice at a later time."

G. 28 U.S.C. § 1446(c)(3) provides:

"The filing of a notice of removal of a criminal prosecution shall not prevent the state court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded."

H. 42 U.S.C. § 1983 provides in relevant part:

"Every person, who, under color of any statute, ordinance, regulation, custom, or usage of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in [a] . . . suit in equity, or other proper proceeding for redress."

I. Rule 38 F.R.A.P. provides:

"If the court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee."

STATEMENT OF THE CASE

The proceedings culminating in the Seventh Circuit's judgment described *supra* at p. 1 began when the appellant below, Richard Haws (Haws), a 67 year old resident of Illinois, was notified by agents of the Federal Bureau of Investigation for the Central District of Illinois that he

was the target of an investigation and likely to be indicted in the United States District Court for the Central District of Illinois for interstate trafficking in stolen agricultural products under 18 U.S.C. §§ 2311-2315, App. 2a, *infra*. Pursuant to being so advised, Haws hired Petitioner, a lawyer licensed in Illinois and other jurisdictions, but not Indiana, to represent him at Petitioner's customary fee of $150.00 per hour respecting any federal indictment or other criminal action resulting from the investigation. App. 2a, *infra*.

Between September 1, 1996 and September 13, 1996, Petitioner investigated the factual basis for what he anticipated would be the federal prosecution against Haws by conferring with the Assistant United States Attorney, the FBI agent involved, and those privy to Haws' means of doing business as Haws Chemical in Catlin, Illinois. App. 2a, *infra*. Petitioner tentatively concluded that Haws had a factual defense which he presented to the Assistant United States Attorney and FBI on Friday, September 20, 1996, in preparation for a meeting Petitioner, the Assistant United States Attorney and the FBI had scheduled for Monday, September 23, 1996. App. 2a, *infra*.

On the morning of Monday, September 23, 1996, the FBI agent in charge of the investigation advised Petitioner the government would not seek Haws' indictment. App. 2a, *infra*. However, the agent also advised he could not assure the various state jurisdictions involved, Illinois, Indiana and Kentucky, would likewise refrain from prosecuting. App. 2a, *infra*.

In the evening of September 23, 1996, Haws was arrested from his residence in Eastern Illinois on a warrant issued on an information filed September 16, 1996 by

the Circuit Court of Fountain County, Indiana in "State of Indiana v. Haws", no. 9609 CF 329, charging him in two counts with theft of property in a value greater than $100,000.00 and "Corrupt Business Practices" (Indiana RICO).[3] App. 2-3a, *infra*. Because Haws was suffering a heart condition requiring medication at regular intervals, he waived, through Petitioner, extradition, pursuant to the representation of Indiana and Illinois authorities he would be transported the short distance from his Illinois home to Fountain County, Indiana where he could post ten percent of the $15,000.00 bond and be forthwith returned to his home. App. 2a, *infra*. The state officials honored that representation.

The warrant required Haws to appear in the Indiana court on September 30, 1996, which he did, accompanied by Petitioner. App. 3a, *infra*. Petitioner did not attempt to enter an appearance as he was and is not licensed to practice in Indiana and had not been given permission to do so by the Indiana Circuit Court. App. 3a, *infra*.

Haws sought *pro se* a continuance of the arraignment which the Indiana Circuit Court granted to November 1, 1996, so as to afford Haws time to seek local Indiana counsel to serve with Petitioner as Petitioner understood to be the objective requirements of Indiana Rule 3, *supra*, p. 2. App. 3a, *infra*.

Between September 30, 1996 and October 8, 1996, Petitioner sent six letters to six Indiana lawyers whose names had been referred him as having experience in criminal cases. App. 3a, *infra*. Petitioner, on behalf of Haws, engaged the services at $250.00 per hour of the

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[3] As prohibited respectively by Indiana Code, § 34-43-2, a Class B felony and § 35-45-6-2(a)(1), a Class C felony.

only Indiana lawyer to reply, Nick Thiros of Merrillville, Indiana, for the purposes of serving as *pro forma* local counsel to satisfy what both Petitioner and Thiros thought Rule 3 required. App. 3a, *infra*.

As Petitioner and Thiros understood, Rule 3 required that Thiros read and sign all pleadings filed on behalf of Haws; confer with Petitioner respecting any and all pleadings served upon Haws by the State; remain abreast of and familiar with all developments in the Fountain County, Indiana criminal action against Haws and remain jointly responsible with Petitioner for same; and, agree to take over responsibility for the case in the event of the disability of Petitioner. App. 3-4a, *infra*. Petitioner, Thiros and Haws agreed that Petitioner would be primarily responsible for the conduct of the defense of the Fountain County criminal action and would utilize Thiros on an as needed basis over and above his participating in the particulars which Petitioner and Thiros deemed to be in compliance with the objective requirements of Rule 3. App. 3-4a, *infra*.

After Petitioner engaged Thiros, Thiros spoke to the Fountain County prosecutors requesting an extension of the arraignment to November 4, 1996 at which time he could move Petitioner's admission as *pro hac vice* counsel for Haws. App. 3-4a, *infra*. In so doing, Thiros learned from the Fountain County prosecutor that if he moved for the admission of Petitioner *pro hac vice* under the circumstances where Petitioner would be lead counsel, the Circuit Court per the Honorable Vincent F. Grogg, presiding judge, would deny the motion, as Judge Grogg enforced Rule 3 as it facially permitted him to do, namely require that Indiana counsel be responsible for the lead representation of all criminal defendants in Fountain County.

App. 3a, *infra.* Thiros also learned from the Fountain County prosecutors that Haws' entitlement to the *pro hac vice* representation of Petitioner was allowed only as a courtesy and on an advisory basis. App. 3-4a, *infra.*

Thiros further learned from the Indiana prosecutors that if he moved Petitioner's admission *pro hac vice* followed by its denial, the Indiana Circuit Court would hold Thiros solely responsible for representing Haws. App. 3a, *infra.* Thiros did not desire that responsibility, nor did Haws desire it for him as Haws did not know Thiros, could not afford to pay an additional $250.00 per hour, and desired the primary representation of Petitioner. App. 3-4a, *infra.*

Petitioner and Thiros agreed it would be imprudent for Thiros to move the admission of Petitioner *pro hac vice.* App. 4a. Petitioner thus prepared for Haws to sign and file *pro se* a motion for a continuance of the November 1, 1996 arraignment date and an amended motion for Petitioner's admission *pro hac vice* and Thiros' admission as local counsel on the basis both understood Rule 3 to require. App. 4a, *infra.* The Indiana Circuit Court continued the arraignment to November 25, 1996, App. 24-25a, *infra,* but denied Haws' *pro se* motion for Petitioner's admission *pro hac vice* and Thiros' limited admission as local counsel. App. 25a, *infra.*

Petitioner then prepared a motion for Haws to sign and file *pro se* to continue the November 25, 1996 arraignment date so as to permit Petitioner to file on behalf of Haws in the Indiana Supreme Court an original action seeking relief in the nature of mandamus or prohibition requiring that the circuit court permit Haws to be represented by Petitioner as lead counsel and Thiros as local counsel on the grounds that Haws was entitled to the

same privileges and immunities in the Indiana courts as a criminal defendant as similarly situated Indiana residents, including the right to counsel of choice. App. 26a, *infra*. The Indiana Circuit Court denied Haws' motion on November 21, 1996. App. 4, 26, 27-29a, *infra*. On November 25, 1996, Haws, accompanied by Petitioner, whom Haws requested be present, appeared *pro se* in the Indiana Circuit Court for arraignment, a "critical stage" of a criminal case. App. 25a, *infra*. He entered a plea of "not guilty." App. 25a, *infra*.

After the arraignment, Petitioner prepared and filed on behalf of Haws on December 26, 1996,[4] an original action for relief in the nature of mandamus or prohibition in the Indiana Supreme Court. App. 26a, *infra*. The Indiana Supreme Court denied that petition on December 31, 1996. App. 27-29a, *infra*.

At the point the Indiana Supreme Court denied Haws' petition for relief in the nature of mandamus or prohibition, Haws faced on January 17, 1997, an "omnibus" hearing, a form of pretrial conference, and thereafter, trial set for April 1, 1997, on two felonies without any counsel at all. App. 25-26a, *infra*. As he had been to engaged to represent Haws' interests, Petitioner perceived no means afforded under Indiana law to spare Haws' undergoing pretrial and trial in the Indiana Circuit Court without counsel. Accordingly, Petitioner filed a Notice of Removal pursuant to 28 U.S.C. §§ 1443(1) and 1446(c)(1) on January 14, 1997, 51 days after the putative

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[4] In conjunction with *pro forma* local counsel Robert Palmer of May, Oberfell & Lorber of South Bend, Indiana.

November 25, 1996 arraignment of Haws in the Indiana Circuit Court. App. 4, 26a, *infra.*

Indiana moved to remand the removed action on only the ground that the notice was untimely as beyond 30 days specified in 28 U.S.C. § 1446(c)(1) of the November 25, 1996 putative arraignment of the unrepresented Haws. App. 4a, *infra.* Prior to the district court's ruling on Indiana's motion to remand, Haws, through Petitioner, filed a 42 U.S.C. § 1983 action seeking declaratory judgment that Rule 3 violated Haws' Sixth Amendment rights and his privilege and immunity to the same rights in an Indiana court as Indiana residents and an injunction against its enforcement. App. 4a, *infra.* Indiana moved to dismiss that action on grounds of *Younger* abstention. App. 4-5a, *infra.*

On April 17, 1997, the district court, per the Honorable S. Hugh Dillin, District Judge, ordered the removed action remanded for the reason that it

> s[aw] no reason why it should grant [Haws] leave to file [his Notice of Removal] at a time later [than 30 days beyond November 25, 1996]."

App. B, 13a, *infra.* On June 5, 1997, the district court per Judge Dillin ordered Haws' § 1983 action dismissed on grounds of *Younger* abstention. App. C, 19a, *infra.*

Haws perfected appeals from both orders which appeals were then consolidated on Haws' motion in the Seventh Circuit. App. 34, 38a, *infra.* The Seventh Circuit scheduled oral argument for November 6, 1997. App. 5a, *infra.* Petitioner was discharged and directed to dismiss

the appeals below, pursuant to which he filed a motion so requesting, followed by Indiana's response agreeing to the dismissal but asking the Seventh Circuit to retain jurisdiction to impose sanctions, followed by Petitioner's seeking leave to reply asking the court that if it retained jurisdiction, to reach the merits. App. 5-6a, *infra*. The court below did so and dismissed the appeals, found them "frivolous" by reaching the merits, and sanctioned Petitioner. App. 6-11a, *infra*.[5]

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[5] In support of sanctions, Indiana at argument falsely asserted matters not of record and which it had never before advanced that Petitioner had fraudulently represented Haws by charging him the excessive fee of $120,000.00 for representing him only in the Indiana Circuit Court case. See, Footnote 1, *supra*, p. iii. In fact, Petitioner has been paid $40,000.00 cash and received two notes in the amount of $80,000.00 to represent Haws not only in the Indiana Circuit Court case, the two Indiana federal actions, and the consolidated appeals therefrom, but in two Illinois felony actions, People of the State of Illinois v. Haws, no. 96-CF-602 and People of the State of Illinois v. Haws, no. 97-CF-13, and an Illinois forfeiture action, People of the State of Illinois v. 1994 Ford 350 Pickup, Claimant Richard Haws, no. 96-MR-110, all in the Circuit Court of Vermilion County, Illinois. Petitioner secured for Haws probationary sentences on the felony charges to run concurrently, and the return of one of two vehicles in the forfeiture action. As reflected in the post argument motion he filed, Footnote 1, *supra*, p. i, Petitioner had expended 750.50 hours prior to October 27, 1997, and had earned $144,278.08 in fees and reimbursable costs. Petitioner perceives that he cannot ethically seek to collect the notes by reason of the sanction judgment below finding the appeals "frivolous".

REASONS FOR GRANTING THE WRIT

A.

The Decision Below Conflicts With and Violates the Mandate of This Court to the Seventh Circuit in *McKnight v. General Motors Corp.*, 511 U.S. 659 (1994), by Finding "Frivolous" an Appeal Pressing the Important Argument That a Non-Resident Criminal Defendant Had the Sixth Amendment Right to the *Pro Hac Vice* Representation of His Home State Counsel of Choice, an Argument Specifically Reserved for Decision by This Court in *Leis v. Flynt*, 439 U.S. 438, 442 n.4 (1979), and Not Yet Decided.

In *Leis v. Flynt, supra,* this Court held that attorneys not licensed in the state of Ohio but requested by an Ohio resident as a criminal defendant in an Ohio court to represent him, had no liberty or property right under the Fourteenth Amendment to appear and represent the defendant in the Ohio court. This Court, however, reserved for decision in *Leis v. Flynt, supra,* 439 U.S. at 442 n.4, the extent to which a state criminal defendant possessed the Sixth Amendment right to the *pro hac vice* representation of counsel not licensed in the state where the defendant faced criminal charges.[6]

In *McKnight v. General Motors Corporation, supra,* 511 U.S. at 659, this Court prohibited the issuance of

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[6] This case is more compelling than the situation presented in *Leis v. Flynt* as the defendant-respondent, Larry Flynt, was an Ohio Resident facing Ohio criminal charges in an Ohio court. Flynt, accordingly, had no privileges and immunities argument as would have had a non-Ohio criminal defendant who attempted to engage the *pro hac vice* representation in an Ohio court of his home state lawyer of choice, as obtains in this case.

sanctions for an appeal as "frivolous" under Rule 38 F.R.A.P. where this Court had not ruled on the core issue presented by the appeal. All the issues presented for review in this case, pp. i-ii, *supra*, and presented below, center on the extent to which a non-resident criminal defendant facing criminal charges in the forum state court has the Sixth Amendment right to the *pro hac vice* representation of his retained home state counsel of choice. The record at bar shows appellant Haws had taken all steps to protect the interests of Indiana as described by this Court in such cases as *Supreme Court of New Hampshire v. Piper, supra,* 470 U.S. at 285-287, and *Wheat v. United States, supra,* 486 U.S. at 159-164, by hiring local counsel to satisfy what both Petitioner and local counsel perceived as the objective requirements of Rule 3.

As the published decision below is in direct conflict with this Court's holding in *McKnight v. General Motors, supra,* this Court's review is merited for two pressing reasons. First, to require the Seventh Circuit to honor the mandate and salutary rule of *McKnight, supra.* Without that review, any lawyer raising an argument on direct appeal of right either not resolved by this Court or specifically reserved by this Court for decision, but with which the court of appeals disagrees, is vulnerable to Rule 38 F.R.A.P. sanctions.

Second, that vulnerability to sanctions will inhibit and make tentative the efforts of lawyers, particularly those originally representing defendants in state criminal cases who confront the Hobson's choice of either removing and filing a § 1983 action or abandoning their clients to face trial without counsel. Any appeal lawyers perfect from adverse district court judgments for pursuing the

former will be subject to the real threat of sanctions under the holding below. *McKnight, supra,* was presumably decided to prevent that very Sword of Damocles inhibiting the efforts of counsel in both the foregoing circumstances.

B.

The Decision Below Conflicts With This Court's Privileges and Immunities Precedents in *Canadian Northern Railway Company v. Eggen,* 252 U.S. 553 (1920); *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1980); and, *Supreme Court of Virginia v. Friedman,* 487 U.S. 59 (1988), Necessarily Including Such of This Court's Right to Counsel Precedents as *Powell v. Alabama,* 287 U.S. 45 (1932); *Gideon v. Wainwright,* 372 U.S. 335 (1963); *Coleman v. Alabama,* 399 U.S. 1 (1970); *United States v. Wade,* 388 U.S. 218 (1967); *Faretta v. California,* 422 U.S. 806 (1975); *Wheat v. United States,* 486 U.S. 153 (1989), and *United States v. Cronic,* 466 U.S. 648, 653 (1984).

1.

The Decision Below Punishes Petitioner for Advancing on Behalf of a Non-Resident State Criminal Defendant the Right to "Equal Access to the Courts of [the Forum State]" as Accorded Citizens of the Forum State Similarly Situated, Including the Right to Counsel of Choice.

Article IV, § 2 of the Constitution provides that, "the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states." In *Canadian Northern Railway Company v. Eggen, supra,* 252 U.S. at 560, this Court observed that it,

> "had never attempted to formulate a comprehensive list of the rights included within the

> [Privileges and Immunities Clause] of the Constitution, Article IV, § 2. . . . "

Nonetheless, this Court observed in *Eggen, id.*, that it,

> "had repeatedly approved as authoritative the statement by Mr. Justice Washington in 1823 in *Corfield v. Coryell*, 4 Wash., C.C. 371, 380 (1823) (the first federal case in which the clause was considered), saying: "We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental.*' "

(Emphasis in *Eggen*). The Court in *Eggen* then noted that in *Corfield*, the Court included in a partial list of such "fundamental privileges", " 'the right of a citizen of one state . . . to equal access to the courts of another state.' " *Id.* In *Supreme Court of New Hampshire v. Piper, supra*, 470 U.S. at 281 n.10, this Court noted, "those privileges on Justice Washington's list [are] still . . . protected by the Clause."

Further, this Court, in *Piper, supra*, 470 U.S. at 280 n.8, recognized the " 'mutually reinforcing relationship' between the Commerce Clause and the Privileges and Immunities Clause." In so doing, the Court in *Piper* held that a non-resident lawyer who had passed the bar of a state could not be precluded under the Privileges and Immunities Clause from practicing law in that state by reason of her non-residency. The *Piper* rule was extended in *Supreme Court of Virginia v. Friedman, supra*, to the rights of a non-resident lawyer to be admitted "on motion" to the bar of a state where she was not a resident, similarly to the right of lawyers who were residents of the state or otherwise permitted to be admitted "on motion."

2.

The Decision Below Punishes Petitioner for Advancing on Behalf of a Non-Resident State Court Defendant the Argument That Defendant Was Constitutionally Entitled Not to be Forced to Trial on Two Felonies Without Counsel, Particularly in Light of His Having Satisfied All the Concerns the Forum State Could Assert as Described in *inter alia Piper, supra; Friedman, supra;* and, *Wheat, supra.*

The Sixth Amendment mandates that, "in all criminal prosecutions, the accused *shall* enjoy the right . . . to have the Assistance of Counsel for his defense." *Powell v. Alabama,* 287 U.S. 45, 68 (1932) (Emphasis supplied). The right to counsel has been established as "fundamental" since *Powell v. Alabama, supra,* in 1932 relative to capital cases as deserving application to the States through the Fourteenth Amendment Due Process Clause. It was so found to be fundamental in *Gideon v. Wainwright,* 372 U.S. 335, 344 (1963), as to all non-capital criminal cases. It was so held fundamental in misdemeanor cases. *Argersinger v. Hamlin,* 407 U.S. 25 (1972). Indeed, the right to the "guiding hand of counsel", *Powell, supra,* was recognized by this Court's unanimous decision in *United States v. Cronic,* 466 U.S. 648, 653 (1984), as so fundamental that, "[o]f all the rights that an accused person has, [it] is by far the most pervasive for it affects his ability to assert any other rights he may have.' "

> The right to the "guiding hand of counsel" requires "in addition to counsel's presence at trial [that] the accused [be] guaranteed that he need not stand alone against the State at any stage of a prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."

Coleman v. Alabama, 399 U.S. 1, 7 (1970). The right to counsel "presum[es] [a right] in favor of counsel of choice." *Wheat v. United States, supra*, 486 U.S. at 160, specifically rejecting the government's argument that the Sixth Amendment only insured an accused, "the assistance of counsel for his defense." Brief of the United States, pp. 6-7, Wheat v. United States, No. 87-4. The right to counsel of choice is personal and thereby permits a defendant the choice of representing himself. *Faretta v. California, supra.*

This case presents a problem more fundamental and important than any lawyer's right to practice law in a particular jurisdiction. It does not present any claim by Petitioner of a right to practice law in Indiana. But, this case does starkly present the right of non-forum state residents haled involuntarily into forum state courts as criminal defendants to be represented by their counsel of choice, where counsel is licensed in the defendants' own state but not the forum state.

It would be profoundly anomalous and contrary to this Court's Sixth Amendment and Article IV, § 2 precedents to relegate the right of non-resident criminal defendants in the courts of a forum state to a position inferior to that of non-resident lawyers who had passed the bar to practice in the forum state as non-residents. *Piper, supra; Friedman, supra.* That profound anomaly has especial force in this case. Petitioner had engaged local Indiana counsel to protect the very interests which Indiana has a right to demand, as outlined by this Court in *Piper, supra*, 470 U.S. at 285-288; *Friedman, supra*, 487 U.S. at 67-70; and, *Wheat, supra*. The decision below requires this Court's review.

C.

The Decision Below Conflicts With Decisions of the First, Third and Tenth Circuits Forbidding Rejection or Disqualification of *Pro Hac Vice* Counsel Without Specific Findings Justifying Such Rejection or Disqualification, Particularly Where the Rejection Has the Effect of Denying a Non-Resident Criminal Defendant Any Counsel at All, Contrary to the Sixth Amendment.

The First Circuit, in *United States v. Panzardi-Alvarez*, 816 F.2d 813, 817 (1st Cir. 1987); the Third Circuit in *Fuller v. Diesslin*, 868 F.2d 604 (3d Cir. 1989), and *United States v. Laura*, 607 F.2d 52, 58 (3d Cir. 1979); and, the Tenth Circuit in *United States v. Collins*, 920 F.2d 619, 626 (10th Cir. 1990), specifically held that a defendant in a criminal case has the Sixth Amendment right to the *pro hac vice* representation of his or her counsel of choice. In particular, the Tenth Circuit in *United States v. Collins* said that while

> "[t]he admission of attorneys *pro hac vice* is permitted to the discretion of the district courts, denial of admission *pro hac vice* in criminal cases implicates the constitutional right to the counsel of choice."

Collins, supra, 920 F.2d at 626. In language mirroring that of this Court in *Piper, supra*, 470 U.S. at 285-287, the Tenth Circuit in *Collins* said:

> "The defendant's choice to retain counsel must be respected 'unless it would unreasonably delay proceedings or burden the court with retained counsel who was incompetent or unwilling to abide by court rules and ethical guidelines' (citation omitted) and 'should be deprived only where such drastic action is necessary to further some overriding social or ethical interests' (citations omitted). Courts must, therefore, balance defendant's constitutional

> right to retain counsel of his choice against the need to maintain the highest standard of professional responsibility, the public's confidence and the integrity of the judicial process and the orderly administration of justice."

Id.

The Third Circuit in *Fuller, supra,* 868 F.2d 607, noted the "highly mobile" bar nationwide which has at its disposal modern transportation and communication. The court in *Fuller* said, therefore, "the number of occasions in which a defendant will desire to be represented by counsel *pro hac vice* is frequent and will be increasingly so." *Id.* This Court had made the same observations in *Barnard v. Thorstenn,* 489 U.S. 546 (1989), and *Frazier v. Heebe,* 482 U.S. 641, 648-665 (1987), as well as in *Piper, supra.*

The court in *Fuller, supra,* 868 F.2d at 607, said that not only did a defendant in a criminal case have the Sixth Amendment right to *pro hac vice* counsel of choice, it said further,

> "[a]rbitrarily to deny defendant the right to obtain counsel from outside the state would untowardly limit the possible choices the defendant might have. Thus, we conclude that the right to counsel *pro hac vice* is encompassed analytically within the right to counsel of choice, and as such should be examined within the analytic framework generally employed in the right to counsel of choice cases."

The Tenth Circuit in *Collins, supra,* 920 F.2d at 626, examined the means by which *pro hac vice* representation could, nonarbitrarily and consistently with the Sixth Amendment, be regulated. Similarly to this Court's holding in *Wheat, supra,* the Tenth Circuit said, "[c]ourts may consider an attorney's ethical fitness before granting a

motion to proceed *pro hac vice*", and require that counsel satisfy the court's interest that a defendant receive competent representation. *Id.*

Thus, in *Collins,* the Tenth Circuit affirmed a district court's order disqualifying defendant's *pro hac vice* counsel because counsel was pursuing an "agenda" type defense based on the lawyer's personal crusade urging the invalidity of the Sixteenth Amendment's grant of power to levy the income tax. The court held that by so doing, the *pro hac vice* lawyer was sacrificing his counsel's legal interests to the espousal of his own rejected legal philosophy.

Appellant below, through Petitioner, in moving for Petitioner's admission *pro hac vice,* asked for a hearing to the extent the Indiana Circuit Court had any concerns of the type expressed in *Wheat, supra,* and *Collins, supra.* The Indiana court did not permit a hearing. Nothing in the record presented before the Indiana court suggested any basis for the court's denying Haws the right to the *pro hac vice* representation of Petitioner. App. 24-25a, *infra.*

The decision below conflicts with the foregoing precedents. The court below attempted to distinguish those precedents on the ground that, procedurally, the right to counsel issue arose on either direct appeal or federal habeas corpus. App. 7-8a, *infra.* By so distinguishing the precedents, the Seventh Circuit extinguished "the most pervasive [of a criminal defendant's rights] . . . affect[ing] his ability to assert any other rights he may have", *Cronic, supra,* 466 U.S. at 653, at the only point functionally and constitutionally meaningful, the first "critical stage" of a criminal prosecution. *United States v. Wade, supra,* 388 U.S. at 226-228.

The decision below thereby violates the longstanding doctrine established by this Court that conditions cannot be placed on the exercise of constitutional rights. See *Speiser v. Randall*, 357 U.S. 513 (1968); *Sherbert v. Verner*, 374 U.S. 398 (1963); and, *Shapiro v. Thompson*, 394 U.S. 618 (1969). The decision below accords priority to Indiana's Rule 3 over Haws' privilege and immunity to equal access to the courts of Indiana as accorded Indiana residents and his Sixth Amendment right to counsel. It requires a non-resident criminal defendant to submit to Rule 3's requirements in order to enjoy that "most pervasive" constitutional right he possesses, the right to counsel. *Cronic, supra*, 466 U.S. at 653. The holding below is constitutionally untenable in light of this Court's precedents construing a criminal defendant's Sixth Amendment rights.

D.

The Decision Below Conflicts With this Court's Precedent in *Justices of the Municipal Court v. Lydon*, 466 U.S. 294, 303 (1984), Barring, Under the *Younger v. Harris* "Other Unusual Circumstances" Test, Abstention to Prevent Federal Adjudication Seeking to Avoid a State Court Order Subjecting a Defendant to a Second Jeopardy, an Order Constitutionally and Functionally Indistinguishable from an Order Forcing a Non-Resident Criminal Defendant to Trial on Two Felonies Without Counsel.

This Court in *Justices of the Municipal Court of Boston v. Lydon*, 466 U.S. 294, 303 (1984), on the authority of *Abney v. United States*, 431 U.S. 661 (1977), held that *Younger v. Harris* abstention could not be employed to bar a 42 U.S.C. § 1983 action seeking to enjoin a second trial in violation of the Double Jeopardy Clause. The Court in

Lydon, supra, 466 U.S. at 303, held that *Younger's* "other unusual circumstances exception" barred abstention as its application would require the state criminal defendant, federal plaintiff, to "run the entire gamut of state procedures, including retrial, prior to consideration of his claim in federal court. . . . "[7] *Lydon, supra,* recognized that the bar against double jeopardy was an immunity of a "special nature" which "could never be fully vindicated on appeal following a final judgment . . . ", as it "protect[ed] 'against being twice put to *trial* for the same offense.' " *Lydon, supra,* 466 U.S. at 303, quoting *Abney, supra,* 431 U.S. at 661. (Emphasis in *Abney*).

Notwithstanding *Flanagan v. United States,* 465 U.S. 259 (1984), discussed *infra,* the right to counsel is of no less a "special nature" than the right not to be subjected to a second jeopardy. Indeed, the right to counsel was held to be "fundamental" in the sense of being "implicit in the concept of ordered liberty", *Palko v. Connecticut,* 302 U.S. 391, 325 (1937), 37 years before the guarantee against double jeopardy was so held. Compare *Powell v. Alabama, supra,* decided in 1932 with *Benton v. Maryland,* 395 U.S. 784 (1969).

Therefore, if anything, the right to the "guiding hand of counsel", *Powell, supra,* is more fundamental and presumably thereby more immune to abridgement prior to trial than is the right to avoid being forced to a second

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[7] This Court's decision last term in *Hudson v. United States,* ___ U.S. ___, 118 S.Ct. 488 (1997), may have diluted the protection of the Double Jeopardy Clause in this respect by saying that it protects only against multiple punishments, not multiple trials.

trial in violation of the Double Jeopardy Clause. No precedent of this Court permits a requirement that a criminal defendant from the outset

> "stand alone against the state at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."

Coleman v. Alabama, supra, 399 U.S. at 7. The right has generally been held to begin at the "critical stage" of a criminal proceeding, usually the arraignment. See, *United States v. Wade, supra,* 388 U.S. at 227, and *Hamilton v. Alabama,* 368 U.S. 52 (1961).[8]

The decision below departs from long established right to counsel norms. It, therefore, requires this Court's review.

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[8] The court below relied only on *Mann v. Jett,* 781 F.2d 1448 (9th Cir. 1986), for its holding that Petitioner procedurally and sanctionably erred in perfecting Haws' right to counsel before, rather than after any conviction he might suffer without counsel. But, *Mann v. Jett* does not support the decision below. *Mann* involved a federal plaintiff facing state charges in Arizona but incarcerated in California. He sought to avoid the Arizona prosecution on the grounds Arizona had not appointed counsel for him. However, the Ninth Circuit rightly upheld *Younger* abstention as the plaintiff had impeded his extradition from California to Arizona, thereby making any claim for appointment of counsel by the Arizona state court at best premature.

E.

The Decision Below Conflicts With This Court's Precedents in *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975); *Coopers and Lybrand v. Livesay*, 437 U.S. 463 (1978); and, *Flanagan v. United States*, 465 U.S. 259, 268-269 (1984), as Ratifying a State Court Order Forcing a Non-Resident Defendant to Trial on Two Felonies Without Counsel, an Order Collateral to the Merits of the State Prosecution and, Therefore, Exempt from the Bar of *Younger* Abstention.

In *Flanagan v. United States, supra,* the Court held that disqualification of joint counsel for multiple defendants was not a final appealable order for the reason it was not collateral to the merits of the case as defendants were required to show prejudice to demonstrate the violation of any right to counsel. The Court in *Flanagan* recognized, however, that rights such as the right to avoid a second jeopardy were collateral to the merits and, therefore, were final and appealable orders under *Coopers and Lybrand v. Livesay,* 437 U.S. 463, 468 (1978). In *Gerstein v. Pugh,* 420 U.S. 103, 108 n.9 (1975), this Court held criminal defendants' § 1983 challenge to a Florida procedure permitting detention on a prosecutor's assertion, but not a magistrate's finding of probable cause was collateral to the merits of a state prosecution and thereby not barred by *Younger* abstention.

The Indiana state court order denying Haws counsel prior to trial is no less collateral under the *Coopers and Lybrand v. Livesay* and *Gerstein v. Pugh* criteria. The state court order denying Haws the *pro hac vice* representation of Petitioner without first hiring full time at full fee an Indiana lawyer as lead counsel thereby effectively denying Haws any counsel at all denied him a

> " 'right . . . far more pervasive [than any other constitutional rights], for it affect[ed] [Haws'] ability to assert any other rights he may have [had].' "

United States v. Cronic, supra, 466 U.S. at 563. Thus, the order of the Indiana court denying Haws the right to counsel was anterior to and preclusive of Haws' ability to even reach the merits of the criminal prosecution. *Id.; Coleman v. Alabama, supra,* 399 U.S. at 7.

The Indiana order, ratified by the Seventh Circuit, foreclosed Haws' opportunity to assert prejudice. It deprived him " 'a reasonably competent attorney' " "whose advice [was] 'within the range of competence demanded of attorneys in criminal cases' ", the primary vehicle through which he could assert prejudice. *United States v. Cronic, supra,* 466 U.S. at 655, quoting *McMann v. Richardson,* 397 U.S. 759, 770-771 (1970). The Seventh Circuit ratified an order precluding Haws from securing a determination of the truth through a criminal trial's "character as a confrontation between adversaries. . . . " *Cronic, supra,* 466 U.S. at 657.

The Seventh Circuit thus upheld an order "presumptively unreliable [and] requir[ing] [n]o specific showing of prejudice . . . ," *id.,* at 659, " '[and] [which] no . . . showing of want of prejudice [could] cure' ", and, therefore, collateral to the merits of the prosecution. *Id.* The decision below, therefore, requires this Court's review.[9]

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[9] The state trial below was never enjoined. Rather, the Indiana trial court, on Haws' *pro se* motion, continued the April 1, 1997 trial date to November 1, 1997, thence to January 5, 1998, and thence to March 5, 1998, at which time Haws appeared and through Attorney McCabe changed his plea of "not guilty" to "guilty" and awaits sentencing on April 20, 1998. However, the

F.

The Decision Below Conflicts With This Court's Sixth Amendment Precedents by Punishing Counsel for Attempting to Discharge His Sixth Amendment Duty to Render the Effective Assistance of Counsel to a Defendant in a Criminal Case by Pursuing the Only Remedies Available to Prevent the Defendant from Facing Trial on Two Felonies Without Any Counsel at All.

A lawyer engaged to represent a defendant in a criminal case is constitutionally required to ensure that the truth finding process be advanced by " 'powerful arguments on both sides of the question.' " *United States v. Cronic, supra,* 466 U.S. at 655. A lawyer is, therefore, required under the Sixth Amendment to ensure that

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Notice of Removal and the pendency of the actions in the courts below may have contributed to the Indiana court's continuing the criminal action.

Petitioner, on behalf of Haws, at pp. 12-17 of his Reply Brief, demonstrated how *Georgia v. Rachel,* predicated on the present wording of 28 U.S.C. § 1443(1) deriving from § 641 of the Revised Statutes of 1874 specifically deleting prior reference to "racial equality" and as construed by this Court's precedents in such cases as *Strauder v. West Virginia,* 100 U.S. 303 (1879); *Neal v. Delaware,* 103 U.S. 370 (1881); and, *Kentucky v. Powers,* 201 U.S. 1 (1906), and the Second Circuit's decision in *New York v. Galamison,* 342 F.2d 255 (2d Cir. 1965), did not require that the federal law which a state law of statewide application offended protected a discrete class of United States citizens only with respect to "racial equality" as held by the court below. Rather, the pre-*Rachel* cases and *New York v. Galamison, supra,* adopted by *Rachel* made clear that federal law need only protect "equal rights". Indiana's argument, sustained below, that the pre-*Rachel* cases had been "overruled by *Rachel*" is foreclosed by *Rachel* itself.

> " 'partisan advocacy on both sides of a case . . . promote[s] the ultimate objective that the guilty will be convicted and the innocent go free.' "

Id. Most importantly, the duty of a lawyer in a criminal case is to ensure that

> " 'an accused person has[] the right to be represented by counsel [as it] is by far the most pervasive [of all the rights of a criminal defendant] for it affects his ability to assert any other rights he may have.' "

Id., at 654.

At the time he removed what became appeal No. 97-2047 below, Petitioner's client Haws faced trial on two felonies with no lawyer at all. The Seventh Circuit has held Petitioner should have abandoned Haws at that point. It has punished him for, instead, pursuing Haws' "right to be represented by counsel . . . affect[ing] [Haws'] ability to assert any other right he may have' " had as a criminal defendant. *Id.*, at 653. The decision below has punished Petitioner's attempt to satisfy his obligation to ensure that Haws had

> " 'counsel acting in the role of an advocate' [for the purpose of assuring] the right of [Haws] to require the prosecution's case to survive the crucible of a meaningful adversarial testing."

Id., at 656.

The decision below defeats this Court's unanimous requirement that a criminal defendant have, beginning at arraignment, " 'most pervasive [right] . . . affect[ing] his ability to assert any other rights he may have' ", *id.*, at 654; *Wade, supra,* 388 U.S. at 227. This Court should, therefore, review the decision below.

G.

The Decision Below *Sua Sponte* Imposing Rule 38 F.R.A.P. Sanctions Without the Appellees Filing a Separate Motion for Same or the Court Giving a Separate Notice and Affording Petitioner an Opportunity to Be Heard Is in Direct Conflict with the Text of Rule 38, in Conflict With the Seventh Circuit's Own Rule 38 Precedents and the Precedents of All the Other Circuits, and Denies Petitioner Due Process of Law.

Rule 38 F.R.A.P. is as explicit in its textual requirements as the statute construed this term in *Brogan v. United States*, ___ U.S. ___, 118 S.Ct. 805 (1998), holding that the "exculpatory no" defense, which may be construed as false, was not a defense. Rule 38 requires a separate motion seeking sanctions or a separate notice from the court indicating its intent to impose them and affording counsel an opportunity to respond.

The Seventh Circuit, in *In the Matter of Tad Bero*, 110 F.3d 462, 466 (7th Cir. 1997) and *Linc Finance Corp. v. Onwuteaka*, 129 F.3d 917, 924-925 (7th Cir. 1997), decisions written by two of the judges on the Panel sanctioning Petitioner, recognized as much. In *In the Matter of Tad Bero, supra*, 110 F.3d at 466, Judge Evans wrote,

> "Before sanctions can be ordered, the rule requires either a separate motion for sanctions or a notice from us that sanctions are in the winds. Although it may be a bit of a waste of time in this case to require strict adherence to procedure as Bero has received actual notice of the request through Dougherty's brief and replied to it in his own, we will do so. . . . Bero will have 14 days to tell us why sanctions should not be ordered or why the sum we note is too high."

Also, Judge Cummings in *Linc Finance Corp., supra*, 129 F.3d at 924-925, said,

> "sanctions under Rule 38 are justified 'when the result is obvious or when appellant's argument is wholly without merit' . . . [a] 'standard [which] depends on the work product. . . . ' [Appellant] could not reasonably have hoped to prevail when his arguments on appeal were . . . pressed . . . before this court without a single citation to a case or statute as support."

The court below found Petitioner had "vigorously argued that the [district court] orders . . . should be reversed." App. 5a, *infra*.

The merits of the appeals below warranted reversal of the orders of the district court. Instead of reversal, the court below found the appeals "frivolous" and sanctioned Petitioner without prior notice or an opportunity to be heard. The textual requirements of Rule 38, which do no more than codify the essential requirement of due process, together with conflicting precedents in the Seventh Circuit and all the other circuits, require this Court's review of the decision below.

CONCLUSION

For the reasons stated herein, Petitioner prays that this Court issue a writ of certiorari to review the decision below.

Respectfully submitted,

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APPENDIX

A: Seventh Circuit Published Opinion – December 10, 1997 ..... 1a

B: District Court Order of Remand – April 17, 1997 ..... 12a

C: District Court Memorandum of Opinion – June 5, 1997 ..... 14a

D: Seventh Circuit Judgment With Oral Argument – December 10, 1997 ..... 19a

E: Seventh Circuit Order Denying Petition for Rehearing *En Banc* – January 26, 1998 ..... 21a

F: Fountain County Circuit Court Docket Sheet 23a

G: Supreme Court of Indiana Order Dismissing Petition – December 31, 1996 ..... 27a

H: United States District Court Docket, IP97-C-0061-D/F 30a

I: United States District Court Docket, IP97-C-0461-D/F 34a

APPENDIX A

In the
United States Court of Appeals
for the Seventh Circuit

No. 97-2047

THE STATE OF INDIANA,

Plaintiff-Appellee,

v.

RICHARD HAWS,

Defendant-Appellant.

No. 97-2521

RICHARD HAWS,

Plaintiff-Appellant,

v.

THE INDIVIDUAL JUSTICES OF THE INDIANA SUPREME COURT, in their official and administrative capacities; JEFFERY MODISETT, in his official capacity as the Indiana Attorney General; VINCENT F. GROGG, in his official capacity as the Circuit Judge of the Fountain County, Indiana Circuit Court,

Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.
Nos. IP97-0061-C-T/G and IP97-0461-C-D/F –
S. Hugh Dillin, *Judge.*

ARGUED NOVEMBER 6, 1997 – DECIDED DECEMBER 10, 1997

Before CUMMINGS, MANION, and EVANS, *Circuit Judges.*

EVANS, *Circuit Judge.* These were bizarre cases in the district court, and they took a very bizarre turn shortly before we were set to hear oral arguments on appeal. One case is an appeal from an order remanding a state criminal prosecution to an Indiana court which followed Richard Haws' removal of the case to the United States District Court for the Southern District of Indiana; the other case is an appeal from the dismissal of a 42 U.S.C. § 1983 suit against the individual justices of the Indiana Supreme Court (and others) in which Haws sought a judgment declaring that he was deprived of counsel of his choice in the Indiana proceeding.

Haws is a 67-year-old man who says he has a heart condition. He is an agricultural chemical dealer doing business as Haws Chemical in Catlin, Illinois. It seems he was advised by the FBI that he might be indicted in federal court, the Central District of Illinois, for interstate trafficking in stolen agricultural chemicals. This warning prompted him to engage Attorney John Bisbee of Macomb, Illinois, to represent his interests. On September 23, 1996, the FBI advised Bisbee that it decided not to seek an indictment.

Haws' troubles were not over, however, because on that same day, Indiana agents, accompanied by Illinois State Police agents, arrested him on a warrant noting charges filed in the state circuit court for Fountain County, Indiana. He was charged in two counts: (1) theft

of property valued at more than $100,000, an Indiana Class B felony; and (2) corrupt business practices (RICO), an Indiana Class C felony.

Haws appeared on September 30 in the Fountain County circuit court accompanied by Mr. Bisbee, who was not licensed to practice law in Indiana. Bisbee did not enter an appearance as an attorney for Haws because Rule 3 of the Indiana Rules on Admission and Discipline says:

> A member of the Bar of another state or territory of the United States, or District of Columbia, may appear, in the trial court's sole discretion, in Indiana trial courts in any particular proceeding for temporary period so long as said attorney appears with local Indiana counsel after petitioning the trial court for the courtesy and disclosing in said petition all pending causes in Indiana in which said attorney has been permitted to appear. Local counsel shall sign all briefs, papers and pleadings in such cause and shall be jointly responsible therefor.

The case was continued for arraignment to November 1, 1996. Haws engaged Indiana counsel, Nick Thiros, to serve as local counsel.

Thiros discussed the case with the Fountain County prosecutor, who told him that the Fountain County circuit court required that Indiana counsel serve as lead counsel, with *pro hac vice* counsel serving in an advisory capacity, and that if Thiros moved for Bisbee's admission the motion would be denied and Thiros would be required to represent Haws alone.

Based on this information, Thiros told Haws it would not be prudent for him to move for Bisbee's admission. Haws then filed a *pro se* motion for Bisbee's admission as lead counsel and for Thiros to appear on a limited basis. He also filed an amended motion; this one was prepared by Bisbee but signed by Haws. The motion was denied without a hearing and the arraignment was continued to November 25. Haws appeared on November 25, accompanied by Bisbee but otherwise unrepresented, and entered a not guilty plea.

On December 27 Haws petitioned the Indiana Supreme Court for mandamus or prohibition, claiming that the denial of his *pro se* motion for *pro hac vice* counsel (Bisbee) to represent him was a violation of his right to counsel and of his rights under the Privileges and Immunities and Equal Protection Clauses of the Constitution. On January 6, 1997, the Indiana Supreme Court denied the petition, saying that the trial judge may have erred but that it was not necessary to address the issue now because an appeal from the criminal case would ultimately be available to correct any errors.

On January 15, 1997, Bisbee, on behalf of Haws, filed a detailed (18-page) "Notice of Removal Pursuant to 28 U.S.C. § 1443(1) and (2)." The case moved to federal court, but it was subsequently remanded back to state court by the federal district judge because the notice of removal was untimely. Meanwhile, Haws, with Bisbee at the controls, filed his § 1983 case against the justices of the Indiana Supreme Court, the Indiana circuit court judge assigned to his case, and the Fountain County prosecutor, seeking declaratory and injunctive relief. On June 5, 1997, the district court dismissed this complaint

citing abstention, pursuant to *Younger v. Harris*, 401 U.S. 37 (1971).

Attorney Bisbee has driven the bus on Haws' two appeals. He signed the main brief which was filed with us on August 5, 1997, and the reply brief that followed 6 weeks later. The briefs vigorously argued that the orders in each case should be reversed. Oral arguments on the appeals were scheduled to be heard on November 6, 1997.

A few days prior to the oral argument date, the appeals fizzled out when Haws fired Bisbee and we were asked to dismiss the proceedings. But not so fast, said the Hoosier State; the appeals were patently frivolous and should never have been filed. Although the State "in the interest of expediting resolution of this matter and avoiding further wasted resources" told us it would not continue its quest for sanctions (it asked for them in its main brief), we were reminded that we could impose them *sua sponte* if we thought they were appropriate. Because things were happening rather fast (a blitz of faxes were coming in), we kept the case on the November 6 calendar, and Mr. Bisbee and the attorney for the State were heard on the dismissal motion and the matter of sanctions.

The first question is whether the appeals should be dismissed. One would think they should be. In a letter to Mr. Bisbee, Haws wrote, "I . . . terminate the services of John H. Bisbee as my attorney on all matters" and I "direct Mr. Bisbee to dismiss the appeal(s) now pending in the U.S. Court of Appeals for the Seventh Circuit. . . . " But Attorney Bisbee filed an odd response to the situation in motion papers we received on November 4. In his filing, Bisbee wrote that Haws' request to dismiss the case

was motivated by "false representations, inducements and importunings" of Attorney James McCabe of Williamsport, Indiana. He wrote further that Haws "gains no perceivable benefit by dismissal of the above captioned appeals but could suffer possible legal detriment by such dismissal. . . . " Bisbee then went on to advance the rather strange notion that we should take judicial notice of Haws "as the representative of a class of non-Indiana resident criminal defendants in Indiana courts" and in that regard permit one of the suits "to continue on behalf of the class judicially so noticed and proceed to argument on November 6, 1997 and decision." Shades of the Twilight Zone.

The appeals, we believe, should be dismissed. The only appellant in each case wants to put an end to the litigation, and he should get his wish. The more interesting question is whether Attorney Bisbee should be sanctioned. We think a sanction is called for because these cases, from the get-go, had procedural obstacles that were insurmountable.

The underlying issue as to whether Haws was entitled to have Bisbee represent him could not properly be presented in these cases even though the general rule is that a court may not arbitrarily deny a defendant the right to retain counsel of his choice. *See United States v. Solina*, 733 F.2d 1208 (7th Cir. 1984); *Wheat v. United States*, 486 U.S. 153 (1988). Does this right extend to the right to have counsel *pro hac vice*? The Supreme Court has decided that it does not offend the lawyer's constitutional rights not to be allowed to appeal. *See Leis v. Larry Flynt*, 439 U.S. 438 (1979). But it left open the issue of the defendant's rights.

The First, Third, and Tenth Circuits have concluded that denial of *pro hac vice* counsel implicates the Sixth Amendment, and a defendant's choice cannot be arbitrarily denied. *United States v. Panzardi Alvarez*, 816 F.2d 813 (1st Cir. 1987); *Fuller v. Diesslin*, 868 F.2d 604 (3rd Cir. 1989); *United States v. Collins*, 920 F.2d 619 (10th Cir. 1990). *Panzardi Alvarez* was a federal trial and the issue was raised on direct appeal; the court concluded his rights had been violated because he did not have *pro hac vice* counsel of his choice. *United States v. Collins* was also a direct appeal of a federal prosecution in which the *pro hac vice* admission of an obnoxious tax-protestor attorney was revoked; the court upheld the revocation because it was not arbitrary and was done in the same manner as a revocation of a regular member of the Western District of Oklahoma. *Fuller* was a state prosecution and the issue was being considered on a habeas petition; the court found that the writ was properly issued because the denial of the right to counsel was violated.

But the cases illustrate that the problem Haws faced was procedural. He had not yet been convicted and he was not raising the issue on a direct appeal or in a habeas petition. The purpose of his ploys was to pull the federal court, prematurely, into Haws' dispute with the State of Indiana. Let's look at each case separately.

Haws challenges the remand of his state criminal action in the first case. Ordinarily, a decision to remand is reviewed *de novo*. However, to the extent that the decision was for a failure to show good cause for filing an untimely notice of removal, we review for an abuse of discretion.

Section 1446(c)(1) provides that a "notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the [petitioner] leave to file the notice at a later time."

Haws was arraigned on November 25, 1996, and his notice of removal was filed 52 days later on January 15, 1997. Haws' only real argument regarding good cause is that the November 25 arraignment should not be the triggering date because he was unrepresented at that time. Also, Haws says that he spent the time between November 25 and the filing of the removal petition attempting to secure relief from the Indiana Supreme Court. We cannot see any scenario here that would have caused us to conclude that the dismissal for untimeliness was an abuse of discretion. Also, Haws did not file an opposition to the State's motion to remand within 15 days as set out in the local rules; instead he filed a motion to require the state to address the merits of his petition.

In any case, whether the removal was timely or not, this was not a case which could be removed under § 1443. Section 1443(1) provides for removal of any state proceeding in which the defendant "is denied or cannot enforce . . . a right under any law providing for the equal civil rights of citizens of the United States. . . . " The Supreme Court has interpreted the statute to apply only if the right alleged arises under a federal law providing for civil rights based on race and the petitioner must show that he cannot enforce the federal right due to some formal expression of state law. *Georgia v. Rachel*, 384 U.S.

780 (1966); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 621 (1979). Haws makes no allegations about race so the removal statute does not apply. Furthermore, although Haws would contend that Indiana's Rule 3 is the inherent bar to his enforcing his right to counsel, to equal protection, and to privileges and immunities, he could only raise the issue in a federal forum through a habeas petition when the time was right. Furthermore, there was no showing here that the Indiana courts were unable or unwilling to resolve his claim. The Supreme Court of Indiana, in fact, acknowledged that the trial judge may have been in error, but that the claim just wasn't ripe for review. On top of that, the Indiana trial judge did not have a chance to decide the issue of whether Rule 3 would allow Bisbee to represent Haws because Bisbee never personally petitioned to appear, as required under the rule, nor has he stated that he would appear under the conditions outlined in the rule – that is, with local counsel jointly responsible for the case. So this was not a removal case.

The § 1983 case was dismissed because entertaining it would constitute federal interference with a pending state court prosecution, contrary to *Younger*. This conclusion was correct.

Younger holds that federal courts cannot enjoin ongoing state criminal proceedings unless extraordinary circumstances are present. In a companion case, *Samuels v. MacKell*, 401 U.S. 66 (1971), the Court applied a similar result to actions for declaratory judgment because they would also interfere with state prosecutions.

Younger and *Samuels* have been extended to apply to various other situations beyond their literal boundaries. In *Simpson v. Rowan*, 73 F.3d 134 (7th Cir. 1995), we followed the examples of other circuits in extending the doctrine to damage actions commenced after the state criminal trial had concluded; the appeal, however, was still pending and could be affected by a decision in the damage action. In *Barichello v. McDonald*, 98 F.3d 948 (7th Cir. 1996), we said that *Younger* has "come to mean that absent unusual circumstances, a federal court must refrain from entertaining injunctive relief which might interfere with the officers or judicial process of state courts and administrative agencies when important state interests are involved." At 954. What Haws asked the district court to do in this suit would clearly "interfere" with the state court prosecution.

The Ninth Circuit applied *Younger* abstention in a case similar to Haws' case – *Mann v. Jett*, 781 F.2d 1448 (9th Cir. 1986). A defendant contended that his right to counsel was abridged because counsel was not appointed for almost two years due to the difficulties encountered in extraditing him from California to Arizona. The court held that Mann could litigate his claim of deprivation of counsel in the state criminal proceedings. Abstention was properly invoked.

The positions taken by Attorney Bisbee in these appeals had no reasonable basis in the law, nor did they make reasonable arguments for the modification or reversal of existing law. They were, particularly from a procedural standpoint, frivolous. And because the oral arguments we heard on November 6 were devoted to the issue of sanctions we will get right to the point; Attorney

Bisbee should be sanctioned under Federal Rule of Appellate Procedure 38. As a sanction, double costs are assessed against Attorney Bisbee, and he is ordered to pay an additional sanction of $2,500 to represent attorneys fees to the State of Indiana.

The appeals are DISMISSED with costs and sanctions as noted.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

STATE OF INDIANA,	)	
	)	
Plaintiff,	)	
	)	No. IP
-vs-	)	97-61-C-D/F
	)	
RICHARD HAWS,	)	
	)	
Defendant.	)	

ORDER OF REMAND

Heretofore, on September 16, 1996, a prosecution by information was filed against the defendant, Richard Haws, in Fountain Circuit Court, Fountain County, Indiana. On November 25, 1996, Haws was arraigned and a plea of not guilty was entered for him as to each of the two counts of the information.

Haws is a citizen of Illinois and wishes to have an Illinois lawyer, one John H. Bisbee, as his primary counsel *pro hac vice*. The judge of the Fountain Circuit Court ruled, pursuant to Rule 3 of the Admission and Discipline Rules of the Indiana Rules of Court, that defendant would be required to procure local Indiana counsel who would be considered to be defendant's chief counsel. Defendant then filed a petition in the Supreme Court of Indiana, seeking a writ of mandate or prohibition overruling the Fountain County court. The petition was summarily denied on December 31, 1996. Thereafter, on January 15, 1997 the defendant removed the criminal action to this court pursuant to the provisions of 28 U.S.C. § 1443(1) and (2).

The State of Indiana has moved to remand the criminal action. The motion is granted. The removal statute provides at § 1446(c)(1) as follows:

> A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the notice at a later time.

The purported removal in this case took place on January 15, 1997, some 51 days after the defendant's arraignment. This Court sees no reason why it should grant the petitioner leave to file at a later time.

The Clerk is directed to return the file to the Fountain Circuit Court forthwith.

Dated this 17th day of April, 1997.

/s/ S. Hugh Dillin
S. Hugh Dillin, Judge

Copies to:
Robert J. Palmer, May, Oberfell & Lorber, Suite 230, 300 North Michigan Street, South Bend, Indiana, 46601
John H. Bisbee, 437 North Lafayette Street, Macomb, Illinois, 61455
Richard M. Holmes, Mark S. Christoff, Fountain County Courthouse, 301 Fourth Street, Covington, Indiana, 47932
Jeffrey A. Modisett, Attorney General, Fifth Floor, IGC-South, 402 West Washington Street, Indianapolis, Indiana, 46204
(Wayne E. Uhl, Deputy Attorney General)

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

RICHARD HAWS, Plaintiff, -vs- THE INDIVIDUAL JUSTICES OF THE INDIANA SUPREME COURT, in their official and administrative capacities only; THE INDIANA ATTORNEY GENERAL, in his official capacity; THE HONORABLE VINCENT F. GROGG, a Circuit Judge of the Circuit Court of Fountain County, Indiana, in his official capacity, Defendants.	)	NO. IP 97-461-C-D/F

MEMORANDUM OF OPINION

This action was filed by the plaintiff who asks, in effect, that this Court overrule the Chief Justice of the Supreme Court of Indiana on a matter involving a rule of state law. The Defendants have moved the Court to dismiss the complaint on the basis of equitable abstention. The motion will be granted and the complaint dismissed.

The undisputed facts are that the plaintiff ("Haws"), a resident of the State of Illinois, is the defendant in a

criminal action filed in the Circuit Court of Fountain County, Indiana. The defendant Vincent F. Grogg is the judge of said court. Haws wants Illinois attorney John H. Bisbee to represent him *pro hac vice*, but the judge has not permitted Bisbee to appear for Haws as yet because Haws insists upon an interpretation of Admission and Discipline Rule 3, Indiana Rules for Admission to the Bar and the Discipline of Attorney ("Rule 3") contrary to that of the judge.

Rule 3 provides, in pertinent part, as follows:

> A member of the Bar of another state or territory of the United States, or District of Columbia, may appear, in the trial court's sole discretion, in Indiana trial courts in any particular proceeding for temporary period so long as said attorney appears with local Indiana counsel after petitioning the trial court for the courtesy and disclosing in said petition all pending cases in Indiana in which said attorney has been permitted to appear. Local counsel shall sign all briefs, papers and pleadings in such cause and shall be jointly responsible therefor.

The question is simply whether the judge can require local counsel to participate in the trial (or at least be present during the trial), or whether Haws can decide that counsel *pro hac vice* (Bisbee) can conduct the trial by himself, without the presence of local counsel.

Interestingly, Bisbee has never applied for admission *pro hac vice* in the Haws case so this action is perhaps moot for that reason. A part of Rule 3 not under attack provides that the attorney seeking to appear *pro hac vice*

may appear "after petitioning the trial court for the courtesy and disclosing in said petition all pending cases in Indiana in which said attorney has been permitted to appear." To this date Bisbee has filed no such petition.

Apparently because of hearsay from the Fountain County deputy prosecuting attorney, Bisbee elected not to apply personally for permission to defend Haws *pro hac vice*, but instead caused Haws, a layman, to file such a petition on September 30, 1996. However, such petition was qualified by the following language:

> Defendant states that Mr. Bisbee will retain as local counsel a qualified member of the Indiana Bar who will do all of those things necessary and required of him and consistent with the Indiana Admission and Disciplinary Rule 3 to the extent those things are not inconsistent with Defendant's rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution respecting the right to counsel, to the extent those things are not violative of Defendant's privileges and immunities as a citizen and resident of Illinois defending a criminal cause in Indiana and to the extent those things do not deny Defendant equal protection of the laws. . . .

On October 29, 1996 Haws filed an amended petition in which he again sought the admission of Bisbee *pro hac vice* as his chief counsel, and appearance of one Nick Thiros, an Indiana lawyer, on a limited basis. The Fountain Circuit Court denied both motions on October 29, 1996.

Following the action of the Fountain Circuit Court denying the *pro se* motions of Haws, Haws filed with the

Supreme Court of Indiana on December 27, 1996 an original action petitioning for relief in the nature of mandamus or prohibition against the Fountain Circuit Court and Vincent F. Grogg, as "one of its judges," seeking to mandate the appearance *pro hac vice* of Bisbee on his own terms. The Supreme Court, by Chief Justice Shepard, summarily denied the petition on December 31, 1996, noting that the appellate process is available for the correction of alleged errors, should the occasion arise.

The next move made by Haws (Bisbee) was to remove the criminal action from the Fountain Circuit Court to this Court on January 15, 1997, citing 28 U.S.C. § 1443(1) and (2) as authority. This Court remanded the action to the Fountain Circuit Court on April 17, 1997, noting that the removal came too late, being some 51 days after Haws' arraignment. 28 U.S.C. § 1446(c)(1). Such ruling of this Court is now on appeal.

The relief which plaintiff seeks is a judicial declaration that Rule 3 as construed is void and unconstitutional on its face and as applied, and that defendants should be enjoined from enforcing Rule 3 "in such a way as to deprive Plaintiff and all others similarly situated their constitutional and federal statutory rights. . . . " Strangely, since the relief sought is equitable, plaintiff demands a trial by jury.

It is obvious that plaintiff seeks to reverse the ruling of a state court judge in a pending state court criminal case (or more accurately, the anticipated ruling which the court might make if plaintiff's Illinois counsel ever files his Rule 3 motion in proper form). We agree with Chief Justice Shepard that the appellate process is available to

the plaintiff for the correction of alleged errors, should the occasion arise. More particularly, however, entertaining a declaratory judgment proceeding under the facts of this case would be improper, as it would constitute federal interference with a pending state court prosecution. *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.E.2d 669 (1970); *Saumuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688. We therefore abstain, and now dismiss the action.

Dated this 5th day of June, 1997.

/s/ S. Hugh Dillin
S. Hugh Dillin, Judge

APPENDIX D

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: December 10, 1997

BEFORE: Honorable WALTER J. CUMMINGS,
Circuit Judge

Honorable DANIEL A. MANION,
Circuit Judge

Honorable TERENCE T. EVANS,
Circuit Judge

No. 97-2047

STATE OF INDIANA,
Plaintiff-Appellee

v.

RICHARD HAWS,
Defendant-Appellant

No. 97-2521

RICHARD HAWS,
Plaintiff-Appellant

v.

INDIVIDUAL JUSTICES OF THE INDIANA SUPREME COURT, in their official and administrative capacities only, JEFFREY A. MODISETT, in his official capacity as the Indiana Attorney General,

and VINCENT F. GROGG, in his official capacity as the Circuit Judge of the Fountain County, Indiana Circuit Court,

Defendants-Appellees

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division. Nos. 97 C 61 and 97 C 461, S. Hugh Dillin, Judge

The appeals are DISMISSED; and attorney Bisbee is sanctioned under Federal Rule of Appellate Procedure 38. As a sanction, double costs are assessed against Attorney Bisbee, and he is ordered to pay an additional sanction of $2,500 to represent attorneys fees to the State of Indiana. The above is in accordance with the decision of this court entered on this date.

APPENDIX E

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

January 26, 1998

Before

Hon. Walter J. Cummings, *Circuit Judge*

Hon. Daniel A. Manion, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

THE STATE OF INDIANA,
Plaintiff-Appellee,

No. 97-2047 v.

RICHARD HAWS,
Defendant-Appellant

RICHARD HAWS,
Plaintiff-Appellant,

No. 97-2521 v.

THE INDIVIDUAL JUSTICES OF THE INDIANA SUPREME COURT, in their official and administrative capacities; JEFFREY MODISETT, in his official capacity as the Indiana Attorney General; and VINCENT F. GROGG, in his official capacity as the Circuit Judge of the Fountain County, Indiana Circuit Court,
Defendants-Appellees

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.

Nos. IP97-0061-C-T/G and IP97-0461-C-D/F

S. Hugh Dillin,
Judge.

ORDER

On December 24, 1997, Richard Haws' former counsel, John H. Bisbee, filed a petition for rehearing with suggestion for rehearing en banc limited to the issue of sanctions. All the judges on the original panel have voted to deny the petition, and none of the active judges have requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

APPENDIX F

FOUNTAIN COUNTY CIRCUIT COURT
CHRONOLOGICAL CASE SUMMARY

DOCKET SHEET PAGE 0001

FILE: STATE VS HAWS, RICHARD	CASE NO. 23C01-9609-CF-329
ACTION: CRIMINAL FELONY	FILED: 9/16/96
JUDGE: VINCENT F GROGG, CIRC CT	CHARGE 2: CORRUPT BUS INFLUENCE
CHARGE 1: REC ST PROP GR 100,000.00	

P 001 ATTORNEY(S):
STATE OF INDIANA

** VS **

D 001 ATTORNEY(S):
RICHARD HAWS

SSN: 325-30-7014

DATE	TYPE	DESCRIPTION
9/16/96	MISC	INFORMATION FILED ALLEGING THEFT AND RICO VIOLATION, WARRANT ORDERED, BAIL FIXED AT $15000, RJO
9/24/96	MISC	WARRANT RETURNED SERVED BY FOUNTAIN COUNTY SHERIFF TO DEFENDANT ON 9-23-96. TA

9/26/96	MISC	BOND RECEIVED IN THE AMOUNT OF $1500. RECEIPT NO. 18462. TA
9/30/96	MISC	STATE APPEARS BY MARK CHRISTOFF. DEFENDANT APPEARS IN PERSON, FILES PRO SE MOTION FOR CONTINUANCE. MOTION GRANTED. HEARING CONTINUED TO NOVEMBER 1, 1996, AT 9:00 A.M. DEFENDANT FURTHER MOVES FOR MOTION FOR ADMISSION PRO HAC VICE PER AD RULE 3. SAME TAKEN UNDER ADVISEMENT PENDING APPEARANCE OF LOCAL COUNSEL.
10/08/96	MISC	COMES NOW THE COURT REPORTER AND FILES COPY OF TRANSCRIPT OF HEARING HELD 9/30/96 WITH THE CLERK AND ORIGINAL MAILED BY FEDEX TO MR. BISBE [sic].
10/29/96	MISC	DEFENDANT FILES FIRST AMENDED MOTION FOR ADMISSION PRO HAC VICE AND FOR ADMISSION OF NICK THIROS OF THE INDIANA BAR ON A LIMITED BASIS AND MOTION FOR CONTINUANCE; AND THE COURT BEING ADVISED NOW: 1) OVERRULES AND DENIES PENDING MOTION OF DEFENDANT FOR JOHN H. BISBEE TO PROCEED PRO HAC VICE FILED 9/30/96 PER SUPREME COURT RULE AD 3; 2)

		OVERRULES AND DENIES FIRST AMENDED MOTION FOR ADMISSION PRO HAC VICE AND FOR ADMISSION OF NICK THIROS OF THE INDIANA BAR ON A LIMITED BASIS; 3) GRANTS MOTION FOR CONTINUANCE AND INITIAL HEARING IS CONTINUED TO NOVEMBER 25, 1996, AT 9:00 A.M. AND DEFENDANT ORDERED TO BE PRESENT AT SAID TIME FOR SAID HEARING.
		___VINCENT F. GROGG, JUDGE (COPY P/ATTY-DEFT-BISBEE)
11/21/96	MISC	DEFENDANT FILES PRO SE MOTION TO CONTINUE, MOTION DENIED. (COPY P/ATTY-DEFT)
11/25/96	MISC	STATE APPEARS BY MARK CHRISTOFF. DEFENDANT APPEARS IN PERSON. INITIAL HEARING HAD, PRELIMINARY PLEA OF NOT GUILTY ENTERED. CAUSE SET FOR OMNIBUS HEARING ON JANUARY 17, 1997, AT 10:00 A.M. AND TRIAL SET FOR 8:30 A.M APRIL 1, 1997. (COPY TO CHRISTOFF)
12/06/96	MISC	COMES NOW THE COURT REPORTED AND FILES COPY OF TRANSCRIPT OF INITIAL HEARING HELD 11/25/96 IN THE ABOVE ENTITLED CASE WITH THE CLERK AND MAILS ORIGINAL TO MR. BISBEE'S OFFICE VIA FEDEX.

12/27/96	MISC	COPY OF PETITION FOR ORIGINAL ACTION IN INDIANA SUPREME COURT FILED, WITH BRIEFS, ETC.
1/03/97	MISC	COPY OF OPINION OF INDIANA SUPREME COURT DENYING ORIGINAL ACTION FILED.
1/17/97	MISC	DEFENDANT FILES PRO SE NOTCIE [SIC] RE: REMOVAL OF CRIMINAL CASES FROM STATE TO FEDERAL COURT.
1/17/97	MISC	STATE APPEARS BY MARK CHRISTOFF, DEFENDANT DOES NOT APPEAR, SEE NOTICE RE REMOVAL OF CRIMINAL CASES FROM STATE TO FEDERAL COURT; TRIAL DATE OF APRIL 1, 1997, CONFIRMED. (COPY P/ATTY-HAWS)
3/26/97	MISC	DEFENDANT FILES PRO SE MOTION FOR CONTINUANCE OF TRIAL SETTING, MOTION GRANTED, TRIAL CONTINUED, BUT DEFENDANT ORDERED TO APPEAR AT 9:00 A.M. APRIL 1, 1997, FOR PURPOSE OF RE-SETTING CAUSE FOR TRIAL. (COPY P/ATTY-HAWS)

APPENDIX G

IN THE
SUPREME COURT OF INDIANA

STATE EX REL. RICHARD HAWS, Relator, v. THE FOUNTAIN COUNTY CIRCUIT COURT AND THE HONORABLE VINCENT F. GROGG, one of the judges thereof, Respondents.	)	CAUSE NO. 23S00-9612-OR-797

ORDER

(Filed Dec. 31, 1996)

Relator, by counsel, has filed a "Petition for Temporary and Permanent Relief in the Nature of Mandamus or Prohibition" with accompanying application papers. Relator is the defendant in a criminal action pending in the respondent court. Relator asks this Court to overrule the respondent court's denial of his motion for the admission of an Illinois attorney *pro hac vice* in the criminal proceeding.

This Court's rules governing the admission of attorneys to practice in Indiana courts provide, in relevant part, that a member of the bar of another state "*may* appear, *in the trial court's sole discretion*, in Indiana trial

courts in any particular proceeding . . . " Ind. Admission and Discipline Rule 3 (emphasis added).

The original action process is intended to address situations where a trial court acts beyond its jurisdictional authority or where a trial court fails to act when it is under a duty to act. Ind. Original Action Rule 3(A)(3). The Court takes due note of Relator's various constitutional arguments attempting to promote the trial court's action to the violation of a *duty*. However, the inescapable fact is that Relator asserts error in the denial of his motion for admission *pro hac vice* of an Illinois attorney, a matter committed to the discretion of the trial court. It may be that the respondent court erred in so ruling. The Court need not and does not address that issue now. The appellate process is available for the correction of alleged errors, should the occasion arise. The original action process, on the other hand, is viewed with disfavor and may not be used as a substitute for the taking of an appeal. Orig. Act. R. 2(E).

Where an application for a writ of mandamus "seeks an unquestionably inappropriate remedy, the Chief Justice . . . shall enter an order dismissing the application without the intervention of the full Court" Orig. Act. R. 2(D) (in part). For the foregoing reasons, this writ petition is accordingly DISMISSED.

The Clerk is directed to send copies of this order to Robert J. Palmer, 300 N. Michigan, South Bend, IN 46001; to Mark Christof, Prosecuting Attorney, Courthouse, 301 4th Street, Covington, IN 47932; to Teryl D. Martin, Clerk Fountain County Circuit Court, P.O. Box 183, Covington, IN 47932; to the Honorable Vincent F. Grogg, P.O. Box 97,

Covington, IN 47932; and to Pamela Carter, Attorney General of Indiana.

DONE AT INDIANAPOLIS, INDIANA this 31st day of December, 1996.

/s/ Randall T. Shepard
Randall T. Shepard
Chief Justice of Indiana

I, H. John Okeson, Clerk of the Supreme Court and Indiana Court of Appeals do hereby certify that the above and foregoing is a full true, complete and correct copy of the original Notification letter and 2 page Order Cause No. 23S00-9612-OR-797 Dated December 31, 1996 as to the same appears upon the record of said court, and in my custody as Clerk.

In testimony Whereof I have hereunto subscribed my name and affirmed the Seal of said Court this 7th day of January, 1997

/s/ Illegible Clerk
By: /s/ Illegible Deputy

APPENDIX H

IP97-C-0061-D/F

UNITED STATES DISTRICT COURT DOCKET

COUNSEL FOR PLAINTIFF(S)

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HAWS, RICHARD

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For:
HAWS, RICHARD

DATE	NR.	PROCEEDINGS
01/15/97	1	NOTICE OF REMOVAL from the Circuit Court of Fountain County Indiana under cause number 23C01-9609-CF-329 by the deft-Richard Haws eod 01/16/97 [CBU]
01/15/97	2	CIVIL COVER SHEET eod 01/16/97 [CBU]
01/15/97	3	MAGISTRATE'S NOTICE eod 01/16/97 [CBU]
01/15/97	4	RECEIPT #024294 in the amount of $150.00 eod 01/16/97 [CBU]
01/16/97	5	SUBMISSION OF FIRST AMENDED NOTICE OF REMOVAL c/s DEFT eod 01/16/97 [CBU]
02/06/97	6	APPEARANCE of Wayne Uhl on behalf of the State of Indiana c/s PLTF eod 02/07/97 [CBU]
02/13/97	7	MOTION FOR REMAND and for Costs (Pltf) c/s eod 02/14/97 [MHK]
02/13/97	8	MEMORANDUM of Law in Support of State of Indiana's Motion to Remand and for Costs (Pltf) c/s eod 02/14/97 [MHK]
03/03/97	9	MOTION for lv to file second amended notice of removal c/s DEFT eod 03/03/97 [CBU]
03/03/97	10	MOTION to require the State of Indiana to submit all its arguments in support of its motion to remand in one motion and supporting memorandum, rather than reserving other arguments for a later time c/s DEFT eod 03/03/97 [CBU]

03/07/97	11	RESPONSE opposing motion for lv to file second amended notice of removal c/s PLTF-State of Indiana eod 03/10/97 [CBU]
03/07/97	12	RESPONSE opposing motion to require further briefing c/s PLTF-State of Indiana eod 03/10/97 [CBU]
03/11/97	13	NOTICE OF FILING motion for admission pro hac vice DEFT eod 03/12/97 [CBU]
03/11/97	14	MOTION PRO HAC VICE of John H. Bisbee on behalf of the deft c/s eod 03/12/97 [CBU]
03/14/97	15	REPLY to pltfs response opposing motion to require that pltf set forth all its arguments in one memorandum c/s DEFT eod 03/14/97 [CBU]
03/14/97	16	REPLY to pltf response opposing motion for lv to file second amended notice of removal c/s DEFT eod 03/14/97 [CBU]
03/27/97	17	ORDER grants the admission of John Bisbee retroactively effective 1/13/97 cm KPF eod 03/27/97 [CBU]
04/17/97	18	CLOSED Remanded to state court (Fountain Circuit) - cm bb SHD eod 04/17/97 [JMC]
04/25/97	19	NOTICE OF APPEAL to CA from the order of remand entered April 17, 1997, c/s, - DEFENDANT/APPELLANT eod 04/25/97 [JAT]
04/25/97	20	DOCKETING STATEMENT or jurisdictional statement, c/s. - DEFENDANT/APPELLANT eod 04/25/97 [JAT]
04/25/97	21	APPEAL FEES PAID RECEIPT # 025603 eod 04/25/97 [JAT]

04/25/97	22	SHORT RECORD SENT TO CA w Notice, Info Sheet & Docket Sheet Designation of record letter sent to parties. eod 04/25/97 [JAT]
05/05/97	23	ACK FROM CA SHORT RECORD received & assigned CA # 97-2047 eod 05/13/97 [JAT]
05/16/97	24	MOTION FOR ATTNY'S FEES and costs c/s PLTF-State of Indiana eod 05/19/97 [CBU]
05/30/97	25	MOTION to defer pltfs petition for costs and attnys fees c/s DEFT eod 06/02/97 [CBU]
06/04/97	26	RESPONSE to motion to defer petition for costs and attnys fees c/s PLTF eod 06/05/97 [CBU]
06/04/97	27	SUPPLEMENT to petition for costs and attnys fees c/s PLTF eod 06/05/97 [CBU]

APPENDIX I

IP97-C-0461-D/F

UNITED STATES DISTRICT COURT DOCKET

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and

DOUGLAS E CRESSLER
ADMINISTRATOR
INDIANA SUPREME COURT
312 STATE HOUSE
INDIANAPOLIS IN 46204
(317) 232-2540

For:
THE INDIVIDUAL JUSTICES OF THE
THE INDIANA SUPREME COURT,
INDIANA ATTORNEY GENERAL, AND
THE HONORABLE VINCENT F GROGG,
IN THEIR OFFICIAL AND
ADMINISTRATIVE CAPACITIES

DATE	NR.	PROCEEDINGS
03/20/97	1	COMPLAINT for Declaratory Judgment & Appropriate Equitable Relief eod 03/21/97 [KAH]
03/20/97	2	RECEIPT #025163 FOR $150.00 eod 03/21/97 [KAH]
03/20/97	3	CIVIL COVER SHEET eod 03/21/97 [KAH]
03/20/97	4	MAGISTRATE'S NOTICE eod 03/21/97 [KAH]
03/20/97	5	SUMMONS issued eod 03/21/97 [KAH]
03/20/97	6	MOTION PRO HAC VICE of John H. Bisbee – PLTF eod 03/21/97 [KAH]
04/10/97	7	WAIVER OF SERVICE OF SUMMONS SERVED ON AND RET'D BY 04-02-97 by Hon. Vincent F. Grogg eod 04/10/97 [KAH]
04/10/97	8	APPEARANCE of Wayne E. Uhl for Defts c/s – DEFTS eod 04/17/97 [KAH]
04/17/97	9	APPEARANCE of Douglas E. Cressler for Deft IN Supreme Court c/s/ – DEFT SUPREME COURT eod 04/17/97 [KAH]
04/17/97	10	MOTION TO DISMISS c/s – DEFTS eod 04/17/97 [KAH]

04/17/97	11	MEMORANDUM of Law in Support of Motion to Dismiss c/s – DEFTS eod 04/17/97 [KAH]
04/17/97	####	REASSIGNED from Judge TINDER to Judge DILLIN eod 04/17/97 [JMC]
04/17/97	####	REASSIGNED from Mag GODICH to Mag FOSTER eod 04/17/97 [JMC]
04/17/97	12	ORDER grants John H. Bisbee of Illinois admission pro hac vice for pltf – cm SHD eod 04/17/97 [JMC]
04/21/97	13	WAIVER OF SERVICE OF SUMMONS SERVED ON AND RET'D BY Wayne Uhl of the DAG's office on 4/3/97 eod 04/21/97 [CBU]
04/21/97	14	WAIVER OF SERVICE OF SUMMONS SERVED ON AND RET'D BY Douglas Cressler, administrator of the Indiana Supreme Court on 4/4/97 eod 04/21/97 [CBU]
05/01/97	15	MOTION for ten additional days w/i which to file response to defts' motion to dismiss cs PLTF eod 05/01/97 [LMW]
05/06/97	16	ENTRY grants pltf time thru 5/12/97 to respond to defts' mot to dismiss – cm SHD eod 05/07/97 [JMC]
05/15/97	17	MOTION for lv to file memorandum in opposition to motion to dismiss instanter c/s PLTF eod 05/16/97 [CBU]
05/16/97	18	ORDER grants pltf leave to file memo in opposition to defts' mot to dismiss instanter – cm SHD eod 05/27/97 [JMC]
05/13/97	19	RESPONSE (memo in opp) to motion to dismiss – c/s PLTF eod 05/27/97 [JMC]

05/13/97	–	AFFIDAVIT of John H. Bisbee eod 05/27/97 [JMC]
05/27/97	20	REPLY to pltfs memorandum in opposition to motion to dismiss c/s DEFTS eod 05/28/97 [CBU]
06/05/97	21	ENTRY (memo of opinion) grants defts' mot to dismiss – cm bb SHD OBV 43 PG 579 eod 06/06/97 [JMC]
DELETED	****	CLOSED Judgment MOT to dismiss for deft OBV 43 PG 579 eod 06/06/97 [JMC]
06/06/97	22	MOTION pursuant to LR 7.5 (a) for oral argument on defts motion to dismiss c/s PLTF eod 06/09/97 [CBU]
06/05/97	23	CLOSED Judgment MOT to dismiss for deft, pltf to pay costs of action – cm SHD OBV 43 PG 592 eod 06/10/97 [JMC]
06/17/97	24	NOTICE OF APPEAL to CA from memorandum opinion entered June 5, 1997, c/s. – PLAINTIFF/APPELLANT eod 06/17/97 [JAT]
06/17/97	25	APPEAL FEES PAID RECEIPT # 026298 eod 06/17/97 [JAT]
06/17/97	26	DOCKETING STATEMENT (jurisdictional statement), c/s – PLAINTIFF/APPELLANT eod 06/17/97 [JAT]
06/17/97	27	SHORT RECORD SENT TO CA w Notice, Info Sheet & Docket Sheet Designation of record letter sent to parties. eod 06/17/97 [JAT]